No. 11,500

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA WESTERN STATES LIFE INSURANCE COMPANY, a Corporation,
Appellant,

vs.

CAROLYN H. VAUGHN, a widow and JOHN ALFRED VAUGHN, and JOAN MARILYN VAUGHN, by their guardian ad litem,
Appellees.

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BRIEF OF APPELLES

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EVERETT PRINTING COMPANY

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STATEMENT OF THE CASE

JAMES ALFRED VAUGHN, the deceased, a resident of Snohomish County, Washington, had been repeatedly solicited by W. Guy Hubbard agent of the plaintiff, to induce him to buy insurance on his life in the plaintiff company, such solicitation having taken place over a period of many years. (R 176).

On or about ~~April~~ Sept. 17th or 18th, 1945, W. Guy Hubbard, agent of the plaintiff, without request of the deceased called at the home of the deceased and talked with him for a period of approximately one and one-half hours, during which period of time the agent sold the deceased a policy of insurance subject to the lawsuit herein. The agent of the company, W. Guy Hubbard, did have difficulty in convincing the deceased that he should at that time take out insurance on his life with the plaintiff company for the reason that the deceased was anticipating a raise in wages and desired to wait until such raise of wages was received before purchasing a policy of insurance. (R 226, 233).

The deceased was a man approximately 37 years of age, in extremely good health and athletically inclined, and at all times immediately prior to his death was actively engaged in outdoor activities. (R 216, 218).

On or about the 3rd day of April, 1945, the deceased called at the office of the family physician, Dr. James A. Durant, and talked with him concerning (R 94) a certain amount of distress in the abdomen. The examination made by the doctor is not clear or certain, but it was known that the doctor in making his limited examination did not take a blood count, found the deceased to have a normal temperature, normal pulse rate, to be in good health, in good weight and in good physical condition (R 103). The doctor also found that the deceased did not appear to be suffering pain and that tenderness could only be elicited from the deceased and upon pressure (R 103, 104). The evidence further showed that the deceased visited Dr. James A. Durant on May 22nd and on September 10th, 1945, and that on each of these occasions the deceased did not appear to be suffering pain, had no temperature, appeared to be in good physical condition, had lost no weight, and only elicited tenderness upon deep pressure. On all of these occasions the doctor did not take any blood count or make any thorough examination, nor at any time did the pulse of the deceased indicate that he was sick or was suffering, except on the examination made on September 25, 1945, the date immediately preceding the date of operation. (R 103, 104 105). (Date of examination for policy was September 18, 1945).

The doctor testified that the deceased had a mild attack of appendicitis and that the only cure, was to have it removed. (R 90). The doctor stated that the deceased did not think that it was serious enough to have anything done about it. (R 108).

Following the solicitation by the agent of the plaintiff insurance company for the policy herein sued upon, the deceased went to the office of the company's doctor, Dr. Tuohy, who made a thorough examination of the deceased, including a manual examination of the stomach with his hand in order to determine whether or not there were any growths or lumps within the abdominal cavity of the deceased. (R 159). The company's examining physician in making this examination, found no growths within the stomach cavity and found no regions which were sensitive. (R 159). The examining physician also found that on the 18th day of September, 1945, the deceased had a normal temperature, a normal pulse rate, and a normal blood pressure, heart absolutely normal, urinal examination good, and that the deceased was in excellent physical condition. (R 158, 159). The examining physician also stated that even though he would have known that the deceased had consulted Dr. Durant and knew what Dr. Durant knew, that he would have passed the deceased as an insurable risk. (R 153).

The deceased signed the answers made to the medi-

cal examiner (R 153) and in answer to question 16, which question was:

> "What illness, disease, accident or operation have you ever had and for what conditions have you consulted a physician? Describe fully."
>
> Answered: "Never sick." (R 153).

The answers to the following questions were in line with such answer. From examination of the medical report it will appear that the mother, 77 years old, and father, 85 years old, and eight brothers and sisters of the deceased, were living and in good health; that the examining physician had known the deceased for twenty years and considered him robust, stocky, of good color, vigorous, and had recommended the deceased as a first class risk. The company's physician and the decedent's physician testified that the general reputation of the deceased for truth and veracity in the community of Snohomish, Washington, prior to his death, was very fine. (R 166, 125).

Dr. Roscoe E. Mosiman a cancer specialist, was called by the plaintiff, and in answer to the following question stated:

Q. Is it quite possible, then, in your opinion, he might not have realized that he was suffering from anything in particular except discomfort? (R 134).

A. I think—oh very decidedly. Very few persons,

except some nervous, high-strung individuals, assumes that he has cancer because he has a little discomfort in his abdomen. (R 135).

The doctor further stated that it was his opinion that the deceased might be uncomfortable and by reason of such condition be awakened at night during this period of time. R. 136).

The wife of the deceased, however, testified that she could recall no occasion which her husband had difficulty sleeping and that she was cognizant of the fact for the reason that she was not well and was awake during the night on many occasions.

Throughout all the testimony it is evident that the deceased did not lose any work on account of sickness at any time during the previous ten years, and was considered by his fellow workmen and friends as a husky, robust man. According to the evidence, the deceased at no time made any complaints to anyone that he was in ill health nor did his actions in any way indicate that he was suffering from pain.

The deceased died on the 19th day of November, 1945, and following his death, proof of death was submitted by the beneficiaries and received by the company in the latter part of November, 1945. (R 237).

On the reverse side of the insurance policy, being

that portion that would appear to the holder of the policy if the same had been folded and placed in an envelope, were marked these words in fairly large print:

> "IMPORTANT—The company should be notified at once of the death of the insured. It is not necessary to employ any person to collect the benefits due under the policy. Save time and expenses by communicating direct with the company." (R 421).

On the 31st day of January, 1946, the plaintiff company commenced its action in the District Court of the United States for recision of the policy of insurance issued on the life of the deceased, and forthwith at the same time secured an injunction enjoining the beneficiaries from instituting a suit for the collection of the proceeds of the said insurance policy.

According to the evidence, the company gave the beneficiaries no notice that they should employ anyone to assist or advise them on how to recover on the policy; nevertheless, without notice, the company brought the action of recession and secured an injunction against the beneficiaries bringing an action on the policy.

A motion to dismiss the injunction was presented and denied, and following of same, the defendants filed their Answer to the Complaint and Cross-complaint

being suit upon the policy, and demand for jury was noted on the Answer as to issues arising on the Cross-complaint.

The three major questions as set forth in page eight of the appellant's Brief are substantially the three major questions involved in this appeal.

ARGUMENT OF CASE

I

Under the Evidence was Vaughn guilty of fraud as a matter of law.

The Court, in its memorandum decision denying motion for new trial stated:

> "The Hoston case fits this case almost precisely." (R 426).

The case of *Houston vs. New York Life Insurance Company*, 166 Wash. 611, 8 Pac. 2nd, 434, involves a case wherein the issues and facts presented therein are substantially the same as the issues and facts presented in this case.

In the Houston case, supra, the insured held a policy of insurance which had lapsed because of non-payment of premium and subsequently the defendant made application for reinstatement of policy. He was then required to answer questions proponded to him, which involved substantially the same questions as presented

in this case; that is, whether or not the defendant had suffered any illness or disease and whether or not the insured had consulted any physician or physicians during the past twenty-four months. The deceased failed to answer that he had consulted a physician as to a mild acute attack of appendicitis, and had been advised as to an operation.

The physician in the Houston case, supra, called on behalf of the insurance company testified as follows at page 439: Pac.

> "Referring to my notes, his complaint showed evidence of soreness of about ten days' duration, the principal complaint being pain and tenderness in the right lower quadrant of the abdomen. His complaint was of pain and tenderness around the appendix the previous ten days. There was no history of any previous attacks, and the notes would indicate that it was of a mild nature. My diagnosis to him was a mild acute attack of appendicitis . . . advised operation."

The Court further stated:

> "What Houston's version was of his consultation of Dr. Beeson, or what was his view of the extent—a temporary ailment or serious disease—of the affliction he may have had at the time of the consultation, we do not know. Houston was dead, hence could not testify. There was testimony, however, that at the time of his application for reinstatement of the policy and up to the time of the reinstatement of the policy, he was in general good health. There is no other evidence of the condition of Houston's health or of his con-

sulting any physician prior to the reinstatement of the policy, other than as he stated in his application, that on April 1, 1927, he was afflicted "with grippe," and Dr. Ellis made one call.

Clearly then, the question whether Houston made the statement in his application falsely and with intent to deceive the company, was one of fact for the jury. Though his statement was false, it was essential to the defense interposed by the appellant that Houston's answer was made with intent to deceive.

Under our statute (Rem. Com. Stat., 7078), the beneficiary's right of recovery upon the policy can not be defeated, though the representations were false, unless it is further found that the representations were made with intent to deceive. *Houston vs. New York Life Insurance Company*, 159 Wash. 162, 292 Pac. 445.

The court correctly instructed the jury that no misrepresentations in the negotiation of the insurance contract by the assured shall be deemed material or shall avoid the policy, unless the misrepresentations were made with intent to deceive. The questions as to the falsity of the answers and whether they were made with intent to deceive, being questions of fact, are foreclosed by the verdict of the ury.

In the Houston case, supra, the Court gave certain instructions to the jury which were much more favorable to the insured than was the case herein presented. You will also find in the Houston case references to many other cases involving the very problem presented herein, and which substantiate the decision in the Houston case and the decision in this case.

The facts of the Houston case and the case here on appeal are peculiarly identical. The Court, in the Houston case, in conclusion, stated at page 443 Pac.:

> "It cannot be held, as a matter of law, that though the answers of Houston were untrue and the applicant knew them to be untrue he intended to deceive the appellant when making such untrue representations. Under our statute, whether the misrepresentation was material and also whether it was made with intent to deceive, were questions for the jury. Those questions, under proper instructions, were by the jury resolved in favor of the respondent."

The primary question presented to the jury was: "Did the deceased make false statements in his application for insurance with intent to deceive the company?"

Rem. Rev. St. of the State of Washington, Section 7078, provides:

> "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresenation or warranty is made with intent to deceive.

The question on appeal is: "Shall the court as a matter of law find the deceased made material false statements with intent to deceive the company and set

aside the verdict of the jury on this alleged question of fact?"

The case of *Houston vs. New York Life Insurance Co., supra,* has not been overruled by any decisions of the State of Washington. This fact was recognized by the trial judge in his memorandum decision (R 425, 426), wherein the Court said:

> "I am not convinced from these later decisions succeeding the Houston case and the Logan case, that in an action of this type there has been any deviation by the Supreme Court of the State of Washington from the rule announced in the Houston case."

The appellant has quoted several cases decided by the Supreme Court of the State of Washington subsequent to the decision in the case of *Houston vs. New York Life Insurance Co., supra,* to indicate that the law of the State of Washington is now different than that set forth in the case of *Houston vs. New York Life Insurance Co., supra.* For these reasons we will review these cases presented by the appellant.

In the case of *McCann vs. Reeder,* 178 *Wash.* 126, 34 *Pac. 2nd* 461, the Supreme Court recognized the rule established in the case of *Houston vs. New York Lfie Insurance Company,* supra, as the law in the State. In that case the defendant secured a policy of insurance upon certain automobiles being operated by

the defendant. In making application for the insurance the insured in response to questions asked, answered that during the past three years he has had no accident as a result of ownership or operation of any auto-vehicle, and no company has refused him insurance on any auto-vehicle. The facts disclosed that during the previous three years the insured had six accidents involving automobiles or trucks either owned or operated by the insured, one of which was being driven by the insured at the time of the accident. The insured also admitted that he had a number of other minor accidents in addition to the six established under the evidence. The evidence also established that following one of the accidents the insurance company handling his insurance had cancelled his policy for unsatisfactory loss record and accident frequency. Under these facts, the court deemed that it should find as a matter of law that the false statements made in the application were made with intent to deceive. The court, however, as I have stated, above, recogized the case of *Houston vs. New York Life Insurance Co.*, supra, as the law in this State and a case in which the evidence was not sufficient to warrant the court in holding as a matter of law that the deceased had made false statements with intent to deceive.

In the case of *Perry vs. Continental Inc. Co.*, 178 Wash. 24, 33 Pac. 2nd 661, the court in no way modi-

fied or repealed the decision in the case of *Houston vs. New York Life Insurance Company*, supra. In that case the insured had secured insurance on a home, and had in the application for insurance declared that she had never suffered a fire loss. The facts, however, established in the trial of the case were that the insured had sustained a fire loss and that a dwelling belonging to her had been destroyed by fire and that she had collected the sum of $4500.00 thereon. Under these facts the court held as a matter of law that the statements made by the insured were made with intent to deceive. In both of the cases it will be noted that the insured had the opportunity of being present in court to defend against any statements made by the company. Whereas, in this case the insured is dead and there is some difficulty in presenting his version of the case.

In the case of *Great Northern Life Insurance Co. vs. Johnson*, 187 Wash. 347, 60 Pac. 2nd 109, the court again recognized the rule established in the case of *Houston vs. New York Life Insurance Co.* supra. In this case the deceased had made application for insurance on her life and had in response to several questions answered in substance that she had never had any disorders of the heart; that she had not had goiter trouble; that she had not lost weight, and had not consulted a physician during the past seven years. The facts established in the case were that she had consult-

ed a physician during the past three years concerning a goiter and had informed this physician that she had been under treatment for goiter for a period of four years; that she also complained of nervousness, tired feeling, attacks of palpitation of the heart, shortness of breath, constipation, and stomach discomfort, slept poorly and had dizziness; that she further had an infected tonsil or piece of tonsil and had the same removed within one year of the date of the application; that she had continued to be treated for goiter and had lost approximately eleven pounds of weight during this treatment; that she also had an exophthalmos, more mark on the right side than on the left; that is, bulging of the eyes; that she also had a definite tremor of the hand characteristic in thyroid cases, and that she was given medicine during a period of approximately eight months while under treatment prior to the application for insurance. On this set of facts, the court held for the company notwithstanding the verdict of the jury.

There have been no other subsequent cases decided by the Supreme Court of the State of Washington concerning the point herein involved and it is our contention as it was the trial judge's contention that the case of *Houston vs. New York Life Insurance Co.* supra, is controlling as to the law of the State of Washington on the point involved herein.

In the present case, the only evidence of any substance is that the deceased visited the family physician and upon examination was found to be in the best of health, except that slight pain of the stomach was elicited upon deep pressure. The evidence is not clear as to the extent or nature of the examination given by the physician. It is evident, however, that the deceased's physician found the deceased to be in the best of health and that there were no indications of any suffering or of any disease when the examinations were made of the deceased.

It will also further be noted that the company's examining physician on the 18th day of September, 1945 found from his manual examination, no growths within the stomach cavity, no tenderness, no temperature, normal pulse, normal blood pressure, normal weight, good color and all other indications of general good health, including the favorable returns of the urinalysis.

In light of these facts, it is our opinion that under the decisions of the Supreme Court of the State of Washington, that a question of fact is presented as to whether or not the deceased made false statements as to material facts with intent to deceive the insurance Company. This certainly, in line with the decisions of the Supreme Court of the State of Washing-

ton, is not such a case as would warrant the Court from finding, as a matter of law, that the deceased made such statements with intent to deceive.

II

Good health, a representation or condition

The appellees maintain that the existence of good health on the part of the deceased under the terms of the policy, was not a condition precedent to its existence. The section of the application in question (R 146, 405) provides:

> "It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is manually delivered to and received by the applicant in person and the first premium thereon paid in full during his lifetime and good health, and then only if the applican has not consulted or been treated by any physician, or changed his occupation, since his medical or non-medical examination; *provided, however, that if the appliant at the time of making this application pays the agent in actual cash the full amount of the first premium for the insurance applied for in Question* 7, 8, 9, *and* 10, *and so declared in this application and received from the agent a receipt therefor on the receipt form which is attached hereto and if the Company, after its usual examination and investigation, shall be satisfied that the applicant was, at the time of completion of this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan with the Additional benefits and with the Accident and Health Insurance and for the amounts applied for in Questions*

> 7, 8, 9 *and* 10 *at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force, under and subject to the provisions of the policies applied for, from and after the date of medical examination, or of the non-medical examination therefor, in accordance with the rules of the Company, whether the policies be delivered to and received by the applicant or not."* (*Italics ours*)

The second provision as underscored provides that the policy shall take effect from and after the taking of the physical examination if the insured shall upon making of the application, pay the first premium and answer certain questions therein asked. The requirement of delivery in good health is not required as it is specifically stated that the policy shall take effect whether delivered and received by the applicant or not.

In the case before this court, the deceased had made application, payed the first premium prior to the physical examination (R 204, 205, 206, 207). Therefore the policy took effect as of the date of the physical examination and was in force whether or not there was delivery of the policy:

In the case of *Logan vs. New York Life Insurance Company*, 107 Wash. 253, 181 Pac. 906, you will note that the policy therein issued was issued with a provision that such should not take effect until the first premium was paid and the policy delivered to and received by the applicant during the applicant's lifetime

and good health. This was a specific condition of the policy. The facts were that following the application, and prior to the delivery of the policy, the applicant had known serious illness from which he later died.

The Court stated at page 909 Pac.:

> "There were three conditions here which were made precedent to the contract becoming effective; first, the payment of the premium; second, the delivery of the policy; and third, the delivery during the lifetime and good health of the insured. All of these conditions must concur before the contract of insurance became effective. If the payment of the premium is a condition precedent, the delivery of the policy during good health is likewise a condition precedent."

It is true that if, good health, were a condition precedent to the policy taking effect, then the question of misrepresentation would not be an issue in this case, as presented to us under Rem. Rev. Statutes of Washington 7078. A careful reading of the provisions of the application will show that under the facts in this case good health was not a condition precedent to the enforcement of the policy.

In the case of *Fraser vs. Metropolitan Life Insurance Co.*, 165 Wash. 677, 5 Pac. 2nd, 978, the court found that the policy contained a provision which provided that the policy did not take effect unless the insured was in good health at the time of its delivery. In this case the Supreme Court of the State of Washington

again followed the decision in *Logan vs. New York Life Insurance Company, supra.* The Court therein stated, in referring to the case of *Logan vs. New York Life Insurance Company, supra,* at page 908 Pac.:

> "The rule therein stated is applicable in the present case because of the breach of the condition of the policy, in that the insured was not in good health at the time it was delivered. . . . . "

The case of *Guarascio vs. Prudential Insurance Company,* 110 Wash. 1, 187 Pac. 405, involves the same question as *Logan vs. New York Life Insurance Co. supra.* For in that case the application among other things, stated at page 405 Pac.:

> "Said policy shall not take effect until the same shall be issued and delivered by said Company and the first premium paid in full, while any health habits and occupation are the same as described in the application."

The facts were that the insured was healthy at the time his application was made, but became ill with tuberculosis between the time of the application and delivery of the policy, and died within a day of the delivery of the policy. The condition set forth above, being a condition precedent to the effective date of the contract, the Court held the policy not to have taken effect.

The provision of the application heretofore set forth clearly provides and sets out two methods which may be

followed by the applicant in applying for his policy of insurance. The first method provides that he may make the application and take the physical examination without making the payment of the premium at such time. In such event the policy, according to the terms of the application, shall not take effect until the payment of the first premium thereon and manual delivery is made to the applicant during his lifetime and good health.

The second method of application provided for allows the applicant to pay the first premium in full at the time of the making of the application and prior to the physical examination. In such event the policy, according to the terms of the application, shall take effect from and after the date of the medical examination whether the policy be delivered to or received by the applicant or not.

The two provisions of the application are distinct in themselves and are separated by the words, "Provided, however, that if . . . " Webster's New Intercollegiate Dictionary defines the word "however" as follows:

"*Nevertheless, notwithstanding, yet, still, though.*"

Certainly the use of the word "however" directs your attention to the fact that there are two distinct methods that the applicant may follow in his application for insurance and that under the two methods

the policies shall take effect under different terms and conditions.

It must be remembered that this policy was written by the company and the terms and conditions thereof, and the interpretation thereof, must be most strongly interpreted in favor of the insured and against the company who wrote and presented this contract. As written, it is clear that under the evidence and the facts in this case, the second provision of this application is the only provision applicable herein. We therefore maintain that the provisions of the application preceding the words "Provided, however," do not apply in this case as to the effective date of the policy or as to conditions therein contained.

The sole question presented by the question of good health is as set forth in question No. 17 (R 153) wherein the applicant was apparently asked by the examining physician the following questions:

> "Are you now in good health as far as you know and believe? A. Yes."

This statement is a representation; Rem. Rev. Statutes of Washington 7078, provides:

> "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such

misrepresentation or warranty is made with the intent to deceive. If any breach of a warranty or condition in any contract or policy of insurance shall occur prior to a loss under such policy, such breach shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of such loss under such contract or policy."

The jury further was submitted under interrogatory No. 2 this question:

"A. Did Alfred Vaugh know that he was not in good health when he signed the application on September 18, 1945?

Answer. No." (R 75).

III.

Were the issues tendered by the pleadings properly submitted to the jury?

On the 18th day of September, 1945, at the solicitation of Guy Hubbard, agent for the company the deceased made application for an insurance policy on his life. The insured died on November 19, 1945, and in due time proof of death was submitted to the company. The policy issued by the company and in the hands of the beneficiaries, the surviving wife and minor children, specifically provided in large print in a conspicuous place that:

"Important—The Company should be notified at once of the death of the insured. It is not neces-

sary to employ any person to collect the benefits due under the policy. Save time and expense by communicating direct with the Company."

An examination of the evidence and the pleadings will indicate that the company did not give any notice that the provision of the policy as above set forth was to be disregarded; however, it did, on the 30th day of January, 1946 less than two and one-half months after the death of the deceased bring action to rescind the policy and at the same time to enjoin the beneficiaries from bringing action on the policy.

Is the court of equity to be used as a sword? Is not the remedy in equity exceptional and the outcome of necessity?

The company maintains that they, being the first into court, have the right to have the case decided completely in equity. It is the rule, however, that fraud in such cases is an adequate defense to a legal action on the policy. *American Life Insurance Co. vs. Stewart*, 300 U. S. 203, 57 S. Ct. 377, 81 L. Ed. 605. *Ettelson vs. Metropolitan Life Insurance Company*, 137 Fed. 2nd, 62.

Are the beneficiaries to be penalized and prohibited from presenting their case to the jury because they were not wise enough to see through the statement on the policy and immediately flee to the court of law with their action?

A fundamental rule of equity is that one seeking equity must do equity. Under the pleadings, the facts and the policy, we maintain that the company has done nothing that should entitle it to demand the extraordinary remedy afforded by the court of equity.

Certainly speed in commencing a law suit, unless there be unnecessary delay, should not be the determining factor in determining the right of trial by jury. Likewise, as stated in *Pacific Indemnity Co. vs. McDonald*, 25 Fed. Supp. 522:

> "It would be a strange situation if a litigant's constitutional guaranties, good when the litigant was plaintiff, were not good as to the identical issues when the litigant was a defendant."

The substantive law of the land is that fraud in the procurement of an insurance policy is provable as a defense in an action on a policy. United States Supreme Court in *American Life Insurance Co. vs. Stewart, Supra.*

The Supreme Court of the State of Washington also enunciated the same rule in *Houston vs. New York Life Insurance Co., supra;* that fraud in the procurement of an insurance policy was an adequate defense in an action at law on the policy.

We maintain that the federal courts are to be governed by the substantive law of the State in which the

case arises. This being so the company has an adequate remedy in a suit at law, and the lower court was correct in granting to the defendant the right of trial by jury in which hearing the company presented its defense, and if established would be a complete and adequate defense to the action on the policy by the beneficiaries.

The latest decision of the highest federal tribunal involving the issue on appeal was handed down by Justice Cardoza in *American Life Insurance Co. vs. Stewart, supra.* In this case two policies of life insurance were issued by the company on the life of the insured. The insured died three months after the policies were issued and three months later the company commenced an action to cancel the insurance policies on the ground of fraud. The beneficiaries then, about a month and a half later, commenced action in the same court on the policies. The insurer asked for an injunction against the continued prosecution of the actions in law. Also a motion to dismiss was interposed. The motion to dismiss was denied but the motion for injunction was not passed on. The beneficiaries then stipulated that the equity action might be tried first.

The court held that in view of the inconestabiliy clause that the beneficiaries might not bring their action and that the defense afforded to the insurer might

be lost and that equity was available in such situations. The court at page 215, however, stated:

> "There is indeed, a possibility that the bringing of actions at law might have been used by the respondents to their advantage if they had not chosen by a stipulation to throw the possibility away. A court has control over its own docket. *Landis vs. North American Co.*, December 7, 1936, 299 U. S. 248, ante, 153, 57 S. Ct. 163. In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same. Ibid. If request had been made by the respondents to suspend the suits in equity till the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity. *Cf. Harnischfeger Sales Corp. vs. National L. Ins. Co.* (C. C. A. 7th) 72 F. (2d) 921, 922, 923. There would be many circumstances to be weighed, as, for instance, the condition of the court calendar, whether the insurer had been precipitate, or its adversaries dilatory, as well as other factors. In the end, benefit and hardship would have to be set off, the one against the other, and a balance ascertained. *Landis vs. North American Co., supra.* But respondents, as already indicated, gave that possibility away. They stipulated that the issues in equity should be tried, in advance of those at law, and that only such issues, if any, as were left should be disposed of later on. . . . . "

The district court in our case was in the position of the district court as described in the above case except that the defendants had not waived their rights by

any stipulation. The court, then, in line with the above decision, had the right to control its own docket, and exercise its sound discretion in holding the action in equity in abeyance pending the action at law. The court also had the right to consider the equities; that is, determine if the plaintiff was precipitate or the defendant dilatory as well as other factors, including the statement on the policy that the beneficiaries need not employ anyone to assist them to collect the policy.

We maintain that the court was justfied in pursuing the course it followed under the circumstances of this case. Certainly it cannot be said that there was an abuse of discretion on the part of the trial court that should warrant reversal.

The point in question was also raised in the case of *Enelow vs. New York Life Insurance Company*, 293 U. S. 379, 79 L. Ed., 440. In this case, according to the decision as written by Chief Justice Hughes, a policy of insurance was issued on the life of the deceased in December 1931, which policy provided that it should become incontestible after two years from date of issue. The deceased died in May 1933 and an action in State court was brought by the beneficiaries in July 1933 and removed to Federal Court.

The insurer set up as an affirmative defense the facts involving false and fraudulent statements in the

application for the policy. The insurer then petitioned the court asking that the equitable issues be heard prior to the action at law, which petition was denied. The court, in its decision, held that the Disrict Courts do have the inherent power to control the progress of causes being presented to them and may stay a case in equity or in law.

As to the merits of the case, the court stated, at page 383:

> "Second. We come to the merits. Was the defense set up by the defendant of such a nature that defendant was entitled to have it heard and determined in equity and to enjoin the proceeedings at law pending that determination? The test under Section 274b is whether the defendant could have maintained a bill in equity on the same averments. The unequivocal language of the provision leaves no room for the argument that the substantive jurisdiction of equity was sought to be changed or enlarged. The defendant's rights to a hearing in equity are "the same," not greater, when he resorts to the summary procedure. . . . And it necessarily follows that this summary procedure cannot aid the defendant when a bill for the same relief would not lie because the defense is one which is completely available in the action at law. Emphasizing the fundamental principle of the equitable jurisdiction, the Congress, from the first Judiciary Act, has declared that suits in equity shall not be sustained in any court of the United States in any case where a "plain, adequate and complete remedy" may be had at law. . . .
>
> The instant case is not one in which there is re-

> sort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable. Here, on the death of the insured, an action at law was brought on the policy, and the defendant had opportunity in that action at law, and before the policy by its terms became incontestable, to contest its liability and accordingly filed its affidavit of defense. That defense was solely that the defendant had been induced to issue the policy by false answers in the application which were alleged to have been made by the applicant "with knowledge of this falsity and fraudulently" in order to obtain the insurance. The affidavit of defense showed nothing whatever as a further ground for equitable relief and the respondent is necessarily confined to the case it made. In such a case, the defense of fraud is completely available in the action at law and a bill in equity would not lie to stay proceedings in that action in order to have the defense heard and determined in equity. . . . "

In the case on appeal the action on the cross complaint and demand for jury had been filed. The period of inconestability ran until September 19, 1947. Certainly there was no eminent danger in July, 1946, the date of trial, that the period of incontestability was about to expire, and certainly this could not be said to exist on January 30, 1946, the date of the filing of the plaintiff's complaint.

A recent case decided since the date that the Federal Rules of Civil Procedure took effect is *Ettelson vs. Metropolitan Life Insurance Company,* 137 Fed. 2nd, 62. In this case the insured was insured in four policies of life insurance issued by the defendant. The insured died in July, 1939, and action was commenced upon the policies by the beneficiaries in November, 1939, in the State Court of New Jersey. The case was then removed to the U. S. District Court and the defendant filed an answer and counter-claim asking for cancellation and recision of the policies because of alleged fraud of the insured. The plaintiff filed demand for jury trial and moved to dismiss the defendant's counter-claim on the grounds that the defendant had an adequate remedy at law. The District Judge denied the motion and stayed the prosecution of the plaintiff's case until after the issues raised by the counter-claim had been determined in equity. From this order the plaintiff appealed.

The court stated, at page 63:

> "The sole question concerned in the appeal is the correctness of the order refusing to dismiss the counter-claim for cancellation and the staying of the suit on the policy until the issues raised by the counter-claim were decided. We think that order was incorrect and that the trial judge was in error in making it."

The court stated further, at page 65:

"(4) Having concluded that the rule of *Erie R. Co. vs. Tompkins* does not affect the procedure in the pending case, the final question is whether the defendant is entitled to have its counterclaim tried by the court, as though the judge was sitting in equity, before the present rules, or whether the plaintiffs are entitled to have the issue tried by a jury. Although under the Federal Rules of Civil Procedure claims and defenses formerly cognizable either at law or equity have been merged into one action, a civil action, the rules have neither enlarged nor diminished the right to either a jury or court trial. Basic issues formerly triable as of right by a jury are still triable by a jury as a matter of right. Rule 38, 28 U.S.C.A. following section 723c. The same obtains where the right previously existed to have an issue tried by the court. We must then inquire whether prior to the adoption of the Federal Rules of Civil Procedure a defense of "equitable" fraud to an action for the proceeds of a life insurance policy was within the exclusive jurisdiction of equity. If it was, then there is no right to the jury trial demanded and defendant's contention that the matter raised in the counterclaim should be tried by the court must be sustained, not because of *Erie R. Co. vs. Tompkins*, but because that is the federal court law on the subject.

(5) We turn then to the federal decisions. The general rule pronounced by the Supreme Court is that in insurance cases, in the absence of special circumstances, which are not present here, "fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available." *American Life Ins. Co. vs. Stewart*, 1937, 300 U. S. 203, 212, 57 S. Ct. 377, 379, 81 L. Ed. 605, 111 A.L.R. 1268, citing *Enelow vs. New York Life Ins. Co.*, 1935, 293 U. S. 379,

385, 55 S. Ct. 310, 79 L. Ed. 440; *Adamos vs. New York Life Ins. Co.*, 1935, 293 U. S. 386, 55 S. Ct. 315, 79 L. Ed. 444; *Insurance Co. v. Bailey*, 1872, 13 Wall. 616, 20 L. Ed. 501; *Cable vs. United States Life Ins. Co.*, 1903, 191 U.S. 288, 306, 24 S. Ct. 74, 48 L. Ed. 188

(6, 7) In none of these decisions, however, is the distinction between "legal" and "equitable fraud" expressly drawn. The defendant has urged that the cases involved "legal fraud" and the rule laid down applied only in such instances. With this contention we do not agree. We find federal decisions going back for more than a hundred years in which, in suits on insurance policies, the question of fraud whether consisting of conscious or innocent mis-statement or nondisclosure has been tried by a jury in an action at law on the policy. Three of the decisions to this effect were written by no less an eminent authority on equity jurisprudence than Justice Story. *McLanahan v. The Universal Insurance Company*, 1825, 1 Pet. 170, 185 7 L. Ed. 98; *Carpenter v. American Ins. Co.*, C. C. D. R. I., 1839, 5 Fed. Cas. page 195, No. 2, 428; *Hazard v. New England Marine Ins. Co.*, C.C.D. Mass., 1832, 11 Fed. Cas. page 937, No. 6, 282, reversed on other grounds, 1834, 8 Pet. 557, 8 L. Ed. 1043, but expressly affirming the point involved here, 8 Pet. at page 583, 8 L. Ed. 1043. See also *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. of New York*, 2 Cir., 1902, 115 F. 77, affirmed on rehearing, 2 Cir. 1903 124 F. 25, certiorari denied, 1904, 192 U. S. 605, 24 S. Ct. 849, 48 L. Ed. 585.

Our conclusion is, therefore, that the federal rule is as broad as its statement and covers all that may be included in the term fraud, whether characterized by the adjective "legal" or "equitable." The issue on such a defense was tried by

a jury prior to the present rules; it continues to be so triable since."

Another decision involving the point at issue rendered since the effective date of the Federal Rules of Civil Procedure is *Beaunit Mills Inc. vs. Eday Fabric Sales Corp.* 124, *Federal* 2nd, 563. In this case the plaintiff brought an action against the defendant for judgment, declaring a certain patent to be invalid, and for injunctive relief. The defendant filed a counter-claim declaring the patent valid and infringed and claimed damages. The only issue actually appealed was the annulment of the defendant's demand for jury. The court felt that there was no appealable order. However, in line with the question of right of trial by jury, under the new rules, the Court stated on page 565:

(2-5) "This very case affords illustration of the practical advantages of discouraging such interlocutory appeals on matters which may well be moot after real adjudication is had. It is true that on issues of patent infringement a jury trial may be had under a claim for damages only, 35 U.S.C.A. 67, as distinguished from a claim for injunction and accounting of profits. 35 U.S.C.A. 70. Here, however, considering the complaint alone, it is framed along equitable lines looking to injunctive relief, both prehibitory and mandatory in character, as well as an accounting, together with declaratory relief substantially as incidental thereto. This appears to stamp it as presenting equitable issues only, *Bellavance vs. Plastic-Craft*

Novelty Co., D. C. Mass., 30 F. Supp. 37, 39; and hence when the district judge acted, he was correct in denying jury trial. But this does not necessarily mean that a jury issue may not later develop. *The appellee simply relies on the old discarded division when it asserts that a case begun as an "equity" suit remains as such, so that all rights of jury trial are thereafter waived by all the parties. But there are no longer equity cases and law cases, and it is the issues, not the form of case, which now determine the method of trial.* Federal Rules 38 (b) and (c), 39 (b); Pike and Fischer, loc. cit.; 3 Moore's Federal Practice 3004-3021, 3029, 3030.

(6) It may be that the issues tendered by plaintiff herein will be entirely decisive of all disputes, under the doctrine of *Leach vs. Ross Heater & Mfg. Co.*, 2 Cir., 104 F. 2d 88. If, however, issues of a legal nature are later developed, the question of jury trial will have to be determined in the light of the then status of the case. Compart *Eastman Kodak Co. vs. McAuley*, D.C.S.D.N.Y., 2F R. D. 21; *Great Northern Life Ins. Co. vs. Vince*, 6 Cir., 118 F. 2d 232, 234. Professor Moore argues persuasively that when "the basic issue" is one which historically was for the jury, a jury demand should be respected, without regard to the party who had first made the claim; or, in other words, that the substance of the action as finally developed should control, not the circumstance of who first commenced it. 3 Moore's Federal Practice 3015, 316. Compare discussion by Pike and Fischer, supra, 88 U. of Ja. L. Rev. at pages 653, 654; *Pacific Indemnity Co. vs. McDonald*, 9 Cir. 107 F. 2d 446, 131 A.L.R. 208; 35 Ill. L. Rev. 339; 13 So. Calif. L. Rev. 170.

The laws of the State of Washington provide for a

system of code pleadings which is somewhat similar to the rules of pleadings under the Federal Rules of Civil Procedure. Under the laws of the State of Washington there is but one action, and that is a civil action, as is similar under the Federal Rules of Civil Procedure. Under this system of pleadings the Supreme Court of the State of Washington, in 151 Wash. 561, 276 Pac. 863, *Millet vs. Pacific Cider and Vinegar Company*, held at page 863 Pac:

> "While it seems plain, looking alone to the allegations of the complaint, that the action would have to be viewed as a pure law action, yet whether it should be viewed as a law action, triable by a jury, or viewed as a suit in equity, triable by the court, is under our code system, determinable by reference to all of the issues raised by all of the pleadings and not by reference to the allegations of the complaint alone."

IV.

Did the District court err in giving appellees proposed Instruction No. 10?

The appellant objected to instruction No. 10 and particularly to the word "convinced" on the grounds and for the reason that the same placed an undue burden upon the appellant.

Webster's Encyclopedic Dictionary, 1941 edition, defines the word "convince" as:

"To persuade or satisfy by evidence."

It is our contention that "convinced" was the proper word to use in this in struction and carried with it the same thought as the words "unless you believe." It is further our contention that it was the proper word to be used in line with the definition as set forth in the dictionary above described.

CONCLUSION

Under the facts and circumstances of this case, and in line with the Statutes and decisions of the State of Washington, a question of fact as to intent to deceive existed which was properly presented to the jury.

Good health under the terms of the policy, as written by the appellant, was not a condition precedent to the policy's existence.

The substantive law of the State of Washington and the Federal Court is that fraud is an adequate defense in a suit on the policy. The court did not abuse its discretion in presenting the issues formed by all the pleadings to the jury. We therefore submit that the judgment of the lower court should be approved.